

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

SOUTHLAND/TUTOR PERINI JV
6535-A Calaveras Road
Sunol, CA 94586

Employer

Docket 11-R5D1-3248

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having ordered reconsideration on its own motion, hereby renders the following decision after reconsideration.

JURISDICTION

Commencing on October 31, 2011 the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment in California maintained by Southland/Tutor Perini Joint Venture (Employer).

On December 22, 2011, the Division cited Employer for two violations of safety orders codified in California Code of Regulations, Title 8.¹ Employer timely appealed, and an evidentiary hearing was held on June 13 and September 5, 2012, before an Administrative Law Judge (ALJ) of the Board. The ALJ issued a Decision (Decision) on December 28, 2012, dismissing both citations.

On January 17, 2013, the Board ordered reconsideration in order to consider whether the ALJ correctly dismissed Citation 1, only.

The Division filed an answer to the Board's Order. Employer did not file an answer.

ISSUE

Was the ALJ correct in dismissing the citation?

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

EVIDENCE

The summary of evidence in the Decision is incorporated herein by reference. In brief, Employer was constructing a tunnel in Sunol, California known as the Alameda West Tunnel. At the time of the alleged violation, the tunnel was approximately 1,000 feet long and Employer's employees were located at the face (or end) of the tunnel. A "road header" (a machine used to dig the tunnel) was present at the face of the tunnel and equipped with an auxiliary fan unit. The Division inspector noticed that the auxiliary fan was not in operation, and therefore cited Employer for violating section 8437(i) [failure to provide auxiliary ventilation].

REASONS FOR DECISION AFTER RECONSIDERATION

After an independent review of the record, we find that the ALJ erred in dismissing the citation. Citation 1 alleges a General violation of section 8437(i): "Auxiliary ventilation shall be used to provide the required airflow to all work areas of the tunnel." The Division inspector testified that the auxiliary fan was not in operation because he did not have to raise his voice to communicate with others and also because he could not feel any air movement. (Decision, p. 4.) He testified that he would know if the fan was on, since it makes a "high-pitch whining sound." The Division inspector's testimony on this issue was credible, and Employer did not refute his testimony or produce any evidence that would tend to show that the auxiliary fan was actually in use. Therefore, it is established that the auxiliary fan was not being used at the time of the alleged violation.

At this point, a violation of section 8437(i) has been established. Section 8437(i) has a clear, singular requirement that auxiliary ventilation shall be used when providing the required amount of airflow. There is no additional requirement that the Division must prove, as part of its *prima facie* case, that airflow was inadequate to begin with; nor does the safety order contain any exception that would allow the minimum airflow to be provided by means other than auxiliary ventilation. Rather, section 8437(i) is a simple requirement that auxiliary ventilation "*shall be used*" when providing the required airflow to all work areas of the tunnel. (Section 8437(i).)

The ALJ erred in this case by requiring the Division to prove that airflow was below the minimum levels required per section 8437(a).² (Decision, p. 7.) However, by imposing such a requirement, the ALJ essentially blended the elements of both sections 8437(a) and (i) together into one safety order. Here,

² Section 8437(a): "Fresh air shall be provided in adequate quantities to all underground work areas. The supply shall at least be sufficient to prevent dangerous or harmful accumulations of dusts, fumes, vapors or gases, and shall not be less than 200 cubic feet per minute for each person underground. The lineal velocity of the air flow in the tunnel bore shall not be less than 60 feet per minute in those tunnels where blasting or rock drilling is conducted or where there are other conditions that are likely to produce dusts, fumes, vapors or gases in harmful quantities."

Employer was only cited for violating section 8437(i) [no auxiliary ventilation used], and was not cited for violating section 8437(a) [listing minimum required airflow]. (See Citation 1, Ex. 1.) Although section 8437(i) uses the term “required airflow” – and thus an employer would reference section 8437(a) in order to know what that required airflow is – section 8437(i), in itself, does not prescribe the minimum airflow requirements. Rather, as already explained, section 8437(i) is simply a requirement that “auxiliary ventilation shall be used to provide the required airflow to all work areas of the tunnel.” (Section 8437(i) [emphasis added].)

The auxiliary ventilation fan was not in use at the location where Employer’s employees were working in the tunnel. A violation of section 8437(i) is therefore established.

DECISION

The ALJ’s decision is overruled with regards to Citation 1 only. Citation 1 is affirmed as a General violation with \$500 penalty.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: APRIL 10, 2013